



United States House of Representatives
One Hundred Eighteenth Congress
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

September 27, 2023

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, D.C. 20220

Re: 88 FR 54961; RIN 1505-AC82; “Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern”

Dear Secretary Yellen:

I am writing to comment on the advance notice of proposed rulemaking (ANPRM) cited above, which the Department of the Treasury (Treasury) issued pursuant to Executive Order 14105. While I am pleased that the scope of this E.O. was less broad than some had anticipated, the ANPRM illustrates that the Administration’s proposed policy on outbound investment is arbitrary, relies on baseless assumptions, and in certain places is incoherent.

As I indicated to Treasury Assistant Secretary Paul Rosen during his testimony before the Committee on September 13, 2023, delegating the implementation of E.O. 14105 to the Office of Investment Security (OIS) makes no sense: Treasury’s Office of Foreign Assets Control (OFAC) already administers outbound investment-related prohibitions against China (NS-CMIC List) and Russia (SSI List), as well as blocking sanctions that encompass outbound investment. OFAC has many years of experience carrying out this work, supported by around 300 Treasury staff. OIS has no comparable expertise or manpower.

In addition, the Assistant Secretary for Investment Security is prohibited from engaging in the ANPRM’s proposed outbound capital controls, as they are clearly unconnected to the inbound mission of the Committee on Foreign Investment in the United States (CFIUS). As Assistant Secretary Rosen himself testified before Congress: “This program will be administered separately from CFIUS.”¹ Under Section 721(k)(4)(A)(ii) of the Defense Production Act of 1950, the Assistant Secretary may only carry out CFIUS duties, a limitation that the Financial Services Committee fully understood when creating the position. This formed part of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the same legislative effort that rejected outbound functions for CFIUS.

For the reasons detailed above, Treasury should reissue the ANPRM under an appropriate official with OFAC or the Office of Terrorism and Financial Intelligence.

¹ <https://docs.house.gov/meetings/BA/BA00/20230913/116338/HHRG-118-BA00-Wstate-RosenP-20230913.pdf>

Additional comments are as follows:

(1) The ANPRM states that countries of concern – specifically China – “seek to, among other things, exploit U.S. outbound investments to develop sensitive technologies and products critical for military intelligence, surveillance, and cyber-enabled capabilities.” However, as I noted in my letter to you of May 25, 2023, U.S. venture capital deals in China have plummeted by 87 percent since 2018.² Moreover, Treasury prepared the ANPRM at a time when Beijing was cracking down on foreign investments,³ a move that has succeeded in driving Western investors *away* from China.⁴ The premise of the ANPRM is inconsistent with this reality.

Treasury’s response to my May 25 letter declined to include 1) any sensitive Chinese technologies that had been developed through U.S. outbound investment; and 2) any data on U.S. venture capital investments or related know-how supporting such technologies. The ANPRM is clearly based on a theory that is uninformed by real-world observations.

The ANPRM’s claims are further undermined by Assistant Secretary Rosen’s September 13 testimony, where he was unable to draw distinctions between civilian and military specifications for artificial intelligence, one of the technologies covered by E.O. 14105.

(2) The ANPRM argues that outbound capital controls are necessary since China “(1) direct[s] entities to obtain technologies to achieve national security objectives; and (2) compel[s] entities to share or transfer these technologies to the government’s military, intelligence, surveillance, and security apparatuses.” Countering the transfer of these technologies is the purpose of intellectual property protections, *inbound* investment screening, and export controls, the latter authorized as part of FIRRMA under the Export Control Reform Act of 2018 (ECRA). It is unreasonable to call on the Treasury Department and the International Emergency Economic Powers Act (IEEPA) to circumvent the Commerce Department and ECRA. The ANPRM’s proposal to exempt intellectual property licensing arrangements also underscores how arbitrary it is.

(3) Enlisting IEEPA and Treasury to block “intangible benefits that accompany U.S. investments” appears to be a novel use of emergency authorities. Many of the so-called “intangible benefits” that the ANPRM cites rely on communication and information from U.S. persons, which cannot be regulated under IEEPA (“whether commercial or otherwise”) unless it is controlled for export, related to espionage, or involves the transfer of value. Treasury attempts to restrict direct investments as a proxy to block information and communication, even when it has no details of the latter’s value. The ANPRM assumes there are intangible benefits from investment that “help companies succeed,” even though the majority of venture capital investments fail. Moreover, much of the value from communication and information that the ANPRM seeks to regulate is presumably derived from discussions held between U.S. investors and other U.S. persons (“investment and

² https://rhg.com/wp-content/uploads/2021/05/RHG_TWS-2021_Full-Report_Final.pdf

³ <https://foreignpolicy.com/2023/05/02/china-anti-espionage-law-foreign-investment-business-data/>

⁴ <https://www.ft.com/content/0b8373a9-3f0e-41c4-9a5d-c816d0c8f9f9> and <https://www.europeanchamber.com.cn/en/press-releases/3529>

talent networks,” “market access”). The ANPRM aims to evade IEEPA’s guardrails by muzzling U.S. investors via their capital, but it is still muzzling.

If the Administration were really concerned, as the ANPRM claims, by venture capital’s halo effect for “enhanced access to additional financing,” then it would have simply prohibited the financing. For example, E.O. 14105 could have levied OFAC blocking measures that made financial and technological support from third parties sanctionable. It certainly would not have exempted, as the ANPRM does, “bank lending; the processing, clearing, or sending of payments by a bank; underwriting services; debt rating services; prime brokerage; global custody; [and] equity research or analysis.” The ANPRM’s dismissal of retroactive application is another signal that the Administration does not consider this a genuine national emergency.

(4) The ANPRM contends that “there remain instances where the risks presented by U.S. investments enabling countries of concern to develop critical military, intelligence, surveillance, or cyber-enabled capabilities are not sufficiently addressed by existing tools.” How many “instances” have there been, and when did they occur? Not only has the Administration refused to identify these supposed loopholes in practice, it cannot point to them in theory: between blocking sanctions and export controls, there are no outbound investment risks that a U.S. person can exploit, except for those permitted by Treasury and Commerce themselves.

(5) According to the ANPRM: “Given the focus on transactions that could aid in the development of technological advances that pose a risk to U.S. national security, the Treasury Department expects to create a carveout or exception for specific types of transactions, such as certain investments into publicly-traded securities or into exchange-traded funds.” Although this exemption makes sense, I would note that the ANPRM’s statement singlehandedly refutes the premise of Treasury’s NS-CMIC program, an effort that – like the proposed outbound capital controls – cares more about rhetoric than effectively undermining China’s military capabilities. Treasury should set aside both charades and wield its sanctions authorities instead.

(6) With respect to the definition of “person of a country of concern,” the ANPRM correctly identifies problems stemming from China’s own nationality policies, which may implicate innocent Americans. Though the ANPRM seeks to resolve this problem with respect to U.S. citizens, it still affects nationals of allied countries and may entail overly burdensome compliance challenges, as well as other unintended consequences.

(7) Under “*E. Excepted Transactions*,” investors’ acquisition of board rights and substantive decision-making influence in an entity would disqualify them from an exemption. As I have written to you previously, this idea draws on text from CFIUS’s authorizing statute in order to turn the rationale for CFIUS on its head. It is China (not the U.S.) that would want to prohibit Americans’ control over Chinese firms, just as CFIUS screens for Chinese (not American) control of U.S. businesses. It would be absurd for the ANPRM to become China’s version of FIRREA, and for the Administration to ask U.S. taxpayers to foot the bill for Chinese investment screening.

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(8) I urge you to consider closely the comments of technical experts regarding the categories of technologies covered under the ANPRM. I would, however, note that the proposal's intent to regulate quantum computing and artificial intelligence (AI) that is "exclusively used" or "primarily used" for certain purposes appears unrealistic. To the extent that innovations lead quantum computing and AI to become widespread, we will no more be able to meaningfully rank their uses than we can those of a motor vehicle (commuting, hauling cargo, shuttling children, running errands) or a mobile phone (gaming, e-mail, multimedia, photography). This is yet another reason to leave such questions to the expertise of export control authorities, or use OFAC sanctions to target bad actors misusing the technologies.

(9) The discussion under "*J. Knowledge Standard*" highlights again the inappropriateness of OIS to this initiative. OFAC has a wealth of experience implementing knowledge standards through its administration of sanctions.

(10) While it is reasonable for Treasury to consider a national interest exemption, such an exemption disproves the underlying theory of the ANPRM. At the same time, the ANPRM would risk tipping off the Chinese government with regard to exempted transactions because it confines exemptions to individual deals. A national interest exemption should primarily take the form of transaction categories that are excepted under the rulemaking.

These excepted categories should be legion. If we oppose China's state-run economy, we want more private investment – not less. Of those private investors, we want more of them to be Americans – not fewer. And if we are truly concerned by China's technology companies, we want as many Americans as possible steering them, spreading Western standards, and complying with U.S. laws.

Sincerely,

A handwritten signature in blue ink, appearing to read "Patrick McHenry", is written over a light blue horizontal line.

PATRICK MCHENRY
CHAIRMAN